

[2011] UKFTT 1688 (TC)



TC01688

Appeal number: TC/10/06355

VAT – Voluntary Registration – re-claim – business – economic activity – yacht charter – Appeal Dismissed.

FIRST-TIER TRIBUNAL

TAX

OCEAN CHARTERS LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL JUDGE: Mrs Anne Scott, LL.B., N.P.,
Member: Mr Ian Malcolm, BSc., BA., JP,**

**Sitting in public at George House, 126 George Street, Edinburgh on Friday 24 June
2011**

Mr Alastair Johnston for the Appellant

Ms Pat Roberts, for the Respondents

© CROWN COPYRIGHT 2011

DECISION

Background

1. This case relates to the disputed decision of the Respondents (HMRC) to cancel the registration of Ocean Charters Limited (OCL) for the purposes of Value Added Tax pursuant to Schedule 1 para 13(3) of the VAT Act 1994 (The Act). In brief, that decision was predicated on the basis that the chartering entered into by the Appellant was not carried out in the course of an economic activity. The consequence of that was that OCL was unable to reclaim VAT amounting to £85,239.13 relating to the purchase of a yacht.

10 Funding Purchase and Management of the Vessel

2. OCL is a Limited Company incorporated on 24 December 2008 in Scotland under the Companies Act with registered no SC352874. The registered office is Euro House, 423 Hillington Rd, Glasgow G52 4BL. OCL is a wholly owned subsidiary of Wood Capital Ltd (WCL), an investment company. Paul Andrew James Wood (Mr Wood or Paul) was at all relevant dates the sole Director in, and the party with ultimate control of, OCL since he owns WCL. Mr Wood is a Chartered Accountant.

3. In his oral evidence Mr Wood said he had incorporated OCL because he had friends who hired vessels, he became aware of a vessel that was available for purchase at a discounted rate and he had an opportunity to borrow from someone with whom he had business dealings for a number of years. He said that having researched the financial possibilities on the internet and having made a few telephone calls and talked to people, for none of which there are records, he had arrived at a financial assessment which suggested that if he made good use of the asset then, because the asset did not depreciate fast, it seemed a viable economic proposition and it offered a very good return on investment. That financial assessment, unsupported by records, in the Tribunal's experience, would not be the approach of a Chartered Accountant acting in a business environment; on the balance of probabilities in the light of all of the evidence this implies a personal investment decision.

4. On 27 December 2008 OCL voluntarily registered for VAT under The Act, Schedule 1, para 9 on the basis that the business of the company was "charter of boats". Mr Wood was clear in his evidence that the VAT refund, which he had anticipated, had been needed to improve the cash flow of OCL and he had viewed it as effectively being working capital which would assist in meeting the business plan.

5. David Buchanan Wylie (Mr Wylie) operates a number of businesses from Euro House, 423 Hillington Rd, Glasgow G52 4BL. In or about October 2008 Mr Wylie and his wife, who had not sailed before, decided on a whim to purchase, without the need for borrowings, a 40 ft yacht at a cost of £336,000 (including VAT) from Prosser Marine Sales Ltd (PMS). Payment for that was made by three payments of £6,000, £15,000 and £15,000 from Mr Wylie on 23 October 2008 and a further £300,000 on 4 November 2008 from an unattributable source but indubitably from Mr Wylie or a company controlled by him. He stated that he paid in cash. Mr Wylie's evidence was that he then went to Spain where he saw larger vessels and he decided that there might

be a lucrative market for chartering a yacht and for that a larger 48 ft vessel would be required. He was clear that on his return he spoke to Mr Wood and told him that that was a good business opportunity. Mr Wood had explicitly been asked by the Tribunal if Mr Wylie who had approached him to set up a business and he stated that he had not done so and that it was he who had approached Mr Wylie because he trusted him and he was the “ideal person to negotiate contracts and get things done”. The relationship between Messrs Wood and Wylie only became explicit in the course of the oral evidence particularly from Mr Wylie (see paragraph 11 below). The Tribunal found that where there was a conflict between their evidence, as on this point, they preferred the evidence of Mr Wylie who was the more open and consistent.

6. Mr Wylie negotiated the cancellation of the first purchase and the substitution of a purchase of a 48 ft yacht; both were called Family Affair. He confirmed that the fact that he could dispose of the first vessel via a trade in against the second vessel (which, in addition, was being sold at a discount) thereby avoiding a possible 10% loss, had been an incentive for him to fund OCL. He had therefore been less concerned about having little or no return on his investment. He said that the funding suited him since it was just a question of topping up the balance over the purchase price of the first vessel.

7. On 23 December 2008 an invoice was issued to Mr Wylie (to a Company name to be confirmed) by PMS for the 2nd yacht at a price of £653,500 (including VAT of £85,239.13). The Tribunal accepted that although the document dated 23 December 2008 purported to be a sales invoice, and was described as such on the face of it, it was in fact a purchase order described as an invoice and the actual sales and VAT invoice was dated 27 January 2009. That invoice was addressed to OCL and was supported by a Bill of Sale dated the same day. The evidence from Mr Wood was that OCL funded the purchase by borrowing £455,975 from him and £210,000 from WCL and the accounts for the year ended 31 March 2009 support that. There is no documentation in place in regard to those loans.

8. On 23 December 2008 a company controlled by Mr Wylie (Lightning Property Limited (LPL)) entered into a Loan Agreement with WCL whereby the former lent the latter £210,000 to be drawn down no later than 60 days from 23 December 2008 with interest at 1% above base payable on the anniversary of the loan each year. That Agreement explicitly states that “the loan shall be used to finance capital expenditure within OCL, a wholly owned subsidiary of the Borrower”. Mr Wood confirmed that the loan was drawn down on 27 January 2009. He stated that £200,000 was paid direct to PMS by LPL and £10,000 to OCL. In fact, the £200,000 was paid on 28 January 2009 by another company controlled by Mr Wylie namely Family Affair Euro Pools Plc. Bank Statements produced by Mr Wood show interest payments of £4,004.38 and £3,150 being paid by WCL to LPL on 20 May 2010 and 16 November 2010. The former payment was therefore late and the latter very early. Mr Wood could not explain the reasons for either other than to say that the early payment compensated for the late one. He proffered the explanation that Mr Wylie had been content with arrangements. In his evidence, Mr Wylie stated quite clearly that “Paul decided on the payments. I don’t get involved in day to day activities. I trust him, he is the accountant”.

9. A second Loan Agreement for £450,000 was also entered into on 23 December 2008 and was between Mr Wylie and Mr Wood and again explicitly states that “the loan shall be used to finance capital expenditure within OCL” but in this instance described as “a company wholly owned by the Borrower”. This loan was interest free
5 and for an initial period of two years. Mr Wood said that £70,000 capital had been repaid on 11 October 2010 when OCL had received payment for the 5 charters that year. The OCL Bank Statement shows a payment of £85,000 to Mr Wylie on that date. Mr Wood said that “Alison” (see paragraph 11 below) had made a mistake and the deposit of £15,000 on the same day was rectification of that error. Documentation
10 for a loan in similar terms for a replacement loan for £380,000 for a period of one year and dated 23 December 2010 was produced. According to Mr Wylie’s evidence the £450,000 was “paid” to Mr Wood largely by the set off of the credit for the first yacht against the purchase of the second and then by funds paid through unspecified bank accounts. It is clear that in addition to the credited funds of £336,000, £92,525
15 was paid to PMS by OCL on 28 January 2009 and a payment of £25,000 from an unattributable source on 24 December 2008.

10. Mr Wylie stated in his witness statement, and confirmed orally, that he acted as agent for OCL and handled much of the management of the company on a day-to-day basis. He could not recall if that had been the intention when the company was
20 incorporated but stated that was how matters had turned out. (That was consistent with the record of the telephone conversation between him and Mr Shearer of HMRC on 12 October 2009 when he said that he was “not sure” of his involvement with OCL and did not know what position he held in the company, if any, albeit he repeatedly referred to OCL using the word “we”). Both Mr Wood and Mr Wylie confirmed that
25 everything that Mr Wylie had done in his capacity as agent had been done at no cost to OCL. However, Mr Wood said that in regard to other work he had done for Mr Wylie’s companies no bills had been rendered.

11. However, it became apparent from Mr Wylie’s evidence that the relationship between Messrs Wood and Wylie was very much more than a business relationship.
30 In his own words Mr Wylie has a very close relationship with Mr Wood. They first met 20 or 30 years previously because Mr Wood’s family owned the next door time share and when Mr Wood was an accountancy student in Glasgow he worked for Mr Wylie. He stated that Mr Wood was a person in whom he has such a high degree of trust that he has a key to his front door and Mr Wood’s father teases him that he has adopted Mr Wood. Mr Wood operates as an accountant for him and a number of
35 his companies. In particular he looks after the financial matters in LPL. He oversees the staff in Glasgow and also deals with his German property company joint venture. He stated that his accountant “Alison” who deals with day to day finance for his companies reports directly to Mr Wood. Alison and Paul deal with credit control for
40 his companies. He sees Mr Wood as his successor and in his words, the migration has already started. He confirmed that the contact telephone number (07812 053 840) which Mr Wood had furnished to HMRC on Form VAT 1 as the contact telephone number for OCL, and on which HMRC had contacted Mr Wood, was his telephone number.

12. At the outset, Mr Wood said that he had not placed the order for the vessel (on 23 December) because he was in London so he had relied on his agent, Mr Wylie. However when he was subsequently asked where the loan agreements had been signed by both parties on 23 December, he said that it was in Glasgow since he was
5 home for a family Christmas. He was then asked why Mr Wylie had placed the order for the vessel on that date and the response then was that it was because he was competent, he had a personal relationship with him and of course there was the matter of the trade in.

13. Mr Wylie said that he had used the vessel, prior to the first charter, for a few
10 lessons on the River Clyde.

14. On 13 January 2009 Kip Marina billed Mr Wylie personally for an annual berth for Family Affair for the period April 2009 to March 2010. That was reimbursed to him from OCL on 4 February 2009. He had clearly organised the berthing arrangements.

15. Mr Wylie confirmed that all six of the charters had been sourced by him, that he had skippered all of them with his wife as crew, that his wife had arranged the Classic Malts cruise on the internet, that he had dealt with all suppliers of food, berthing and fuel etc and those who chartered the vessels either paid him for those items or paid the suppliers directly. He attended to maintenance of the vessel and researched routes for
20 charters. He stated that he had agreed the terms for commercial charters for the vessel with Catima Sailing Ltd, an unconnected company which provided charter services (Catima). However, that had not progressed as detailed in paragraph 24 below. He had not charged the company for his services (as indicated in paragraph 9 above) since “It keeps me out of the office”. There have been no charges for Mrs Wylie’s services. Although Mr Wood stated that he made all of the decisions in regard to the company it was very clear that the day-to-day management and control lay in
25 Mr Wylie’s hands as he was in his own words “the man on the ground”. It was accepted that Mr Wood did know what Mr Wylie was doing, not least because they were personally very close and Mr Wood dealt with many of the financial aspects of
30 Mr Wylie’s businesses.

The Charters

16. The only charter in 2009 was for the Classic Malts Cruise and was to a Mr Ayni whom Mr Wylie had known for two years. They had met in Spain where, because Mr Ayni has a boat and likes whisky, they had been discussing the Classic Malts
35 Cruise. Mr Ayni asked Mr Wylie to organise his participation in the cruise. Mrs Wylie booked the Classic Malts Cruise for 11 July to 25 July 2009 and was recorded as being the owner of the vessel. Mr Wylie said that he did not know why she had been recorded as the owner but that it was probably because she had filled in the forms. Mr Wood dismissed it as being a simple error. The Tribunal was not
40 persuaded by that given that the purchase of the original vessel had apparently been at her behest. On the balance of probabilities it seems quite probable that she was unaware that there was corporate ownership of the vessel.

17. Mr Wood told the Hearing that Mr Wylie had done the bulk of investigation as to whether Mr Ayni could afford the charter fees etc. He had relied on that and he himself had googled Mr Ayni and a quick investigation had shown him to be a man of substance. He had a number of businesses in Europe and was linked to a number of ventures which were reasonably successful. By contrast Mr Wylie said that he had known him for some time, that he wore a lot of gold and that he had done no diligence but simply suggested to Mr Wood that the vessel be used for that Cruise. We noted the difficulty HMRC had experienced in obtaining any detailed information about Mr Ayni and decided to prefer and accept the evidence of Mr Wylie that no enquiry had been made.

18. There was no charter agreement; only an invoice dated 11 July 2009 was produced. That invoice had minimal terms of hire: - "The client is responsible for all fuel costs, which will be invoiced separately, and for arranging insurance. Continental breakfast on board is included, however all other meals are at the Client's expense". It stipulated the price as 11,500 Euros converted into £7,352.94 plus VAT of £1,102.94, a total of £8,455.88. There were no records for the cost of the continental breakfasts or any other costs. Payment for the fuel was made in cash at the time. Payment of the invoice was made in Euros in advance, in cash and those funds were kept in Mr Wylie's home and not banked by Mr Wylie until 8 February 2010 and at that juncture £11,500 was lodged.

19. Mr Wood stated in evidence that the monies had not been banked at his request since he had known Mr Wylie for a long time and Mr Wylie had funded the purchase of the vessel so the funds would be safe with him. He said that because of his job he believed that there would be volatility in the exchange rate which would work in the company's favour and that when the funds were banked Mr Wylie had said that the difference in rates was marginal (Mr Wylie confirmed that that had been his belief), hence the quantum of the sum banked. In cross-examination, he was asked why he had taken such a decision since he had described the VAT refund as crucial for cash flow. His response was that, at that time because of the defects in the vessel, and the problems with obtaining the VAT refund, they were unable to continue with the business so the funds did not need to be banked. That does not square with what he wrote in a letter dated 29 November 2009 to HMRC where he said that the price quoted to Mr Ayni had been below market rate inter alia because of the difficulties with VAT and because the company was running short of funds at that time. Further, as a matter of fact, there was fairly little movement in the exchange rate in that period. That does not account for a 36% increase in the amount credited to OCL.

20. In 2010, the defects not having been rectified, there were five charters and all were introduced by Mr Wylie and according to Mr Wood they were used by Mr Wylie to promote his businesses. Mr Wylie confirmed that he was the source of all of these charters partly because he saw it as an opportunity to entertain family and friends and, because Paul had taken on the charter business, he saw it as a way of helping him in the short term. As indicated above he skippered all of these charters with his wife as crew.

21. The invoices for those charters were produced by the Appellant. They were not in sequential order i.e. invoice OC-005 to Euro Pools Ireland Ltd for the period 12 July 2010 to 26 July 2010 was dated 31 July 2010 as was invoice OC-001 to the related company Euro Pools Plc for the period 28 June to 11 July 2010. Yet invoices
5 OC-002 and OC-003 to David Sibbald and Simon Smith were dated 31 August and 30 September respectively. Invoice OC-004 is dated 1 October 2010 and carried no dates for the charters. Mr Wylie was clear that he did not know why the invoices were not chronological because he was not involved in issuing them. He said that was a matter for Alison and Paul.

10 22. As far as the bills to the Euro Pools companies are concerned Mr Wylie said that he had split the bills between his companies since the vessel had been his base for a series of interviews for a project. That was clearly his decision. Invoice OC-002 had been paid in cash in advance by David Sibbald, who is a friend and business
15 associate, and the payment for OC-003 (Mr Smith) had been paid by Mr Wylie who said that he had treated it as a loan; Mr Wood described Mr Smith as someone with whom Mr Wylie wished to go into business and that a yacht would provide close quarters to enable him to get to know him better. It was noted from the Witness Statement for Mr Shearer of HMRC (and that was not challenged) that HMRC had ascertained that Mr Smith was a fellow director of Mr Wood in a company, World
20 Leisure (UK) Limited. Invoice OC-004 related to a friend of Mr Wylie's daughter and was paid in two tranches. It was unclear when, by whom or how other than that Mr Wylie said that it had been paid by cheque direct to the OCL bank account.

23. The audit trail for payment of those invoices was less than clear. Mr Wylie said that all payments were made in advance. Mr Wood had previously said that the delay
25 in banking the payments was because he had had to offer terms that were attractive so credit had been offered. On being asked if that had been commercially viable he said that it was since the charters were to people known to them so there was no credit risk. However, Mr Wylie was quite clear that Mr Sibbald had paid him £12,000 in advance in August in cash and that he had retained the funds in the house until the end
30 of the season. It had been a case of "laziness"; the funds had been transferred to the Bank in October to "tidy up". In his witness statement at paragraph 14 Mr Wylie stated that "The Company's bank statement from 2 October to 1 November 2010 (exhibit DW5) shows the lodgement of the fees for the 2010 charters". That statement shows two unattributable deposits of £12,000 on 4 and 11 October which
35 are presumably OC-002 and OC-003 for Messrs Sibbald and Smith. Mr Wylie said that the £20,751.79 related to invoice OC-001 for £23,800 after expenses had been cross charged (and there was no record of those expenses) and that the three payments from Euro Pools PLC of £10,000, £4,500 and £9,500 on 11 October related to invoice OC-005 for £24,000. On being asked why there were three payments he said that
40 Alison and Paul dealt with those matters. There is no trace of the payment of £4,000 for OC-004, there are only an unattributable deposit of £1,000 from Euro Pools and a matched deposit and withdrawal of £9,500 from and to Euro Pools and the payment to and from Mr Wylie of £85,000 and £15,000 referred to in paragraph 8 above.

24. In October 2009 OCL entered into a charter agreement with Catima whereby
45 Catima would manage the vessel to generate charter income for a period of one year

from the date of signing. Amongst other provisions that contract stipulated that OCL would comply with the MCA Code of Practice at all times and insure the vessel for commercial use. The yacht was advertised on the Catima website. That advertisement stated that the yacht was “fully coded for commercial use to the exacting standards of the UK Maritime and Coastguard Agency”. No charters were obtained in terms of that contract.

25. The Maritime and Coastguard Agency (MCA) has not coded the vessel for charter. Such a coding would be required if the vessel is utilised for commercial charters. No application has been made for that coding since before doing so alterations would have to be made to the vessel. Mr Wood was aware that, as noted in paragraph 27 below, alterations would invalidate the warranty. He believed that coding the vessel would reduce its eventual resale value.

26. The Certificate of Insurance for the vessel from Haven Knox-Johnson makes it explicit that the vessel was insured by OCL for “private and pleasure” use only. The Tribunal did not accept Mr Wood’s argument that the Insurers should have guessed from the name of the company that there were commercial charters and that therefore the insurance would have been valid.

27. The shipbuilder’s warranty for the vessel does not allow for commercial use; there are claims under the warranty and if there had been commercial use the warranty would be invalidated.

28. In April 2011 OCL commenced proceedings in the Sheriff Court against PMS in regard to the alleged defects in the vessel. The pleadings in that case were lodged by Mr Wood. It is noted that the Defenders aver that OCL operated a chartering business and that Mr Wylie was the Pursuer’s Director who had highlighted some minor issues to the Defenders.

VAT

29. As indicated in paragraph 3 above, OCL was voluntarily registered for VAT with effect from 28 December 2008 as a yacht chartering business. The first VAT return, which incorporated a VAT repayment claim for of £85,239.13, was submitted to HMRC on 7 July 2009 for VAT period 06/09 covering 24 December 2008 to 30 June 2009. On 31 March 2010 HMRC issued a decision that that VAT return for the period 06/09 should be amended at Box 4 to show that Input Tax Reclaimable be reduced to £0.00 and that therefore the amount due from HMRC is amended to £0.00 for that period.

30. It was not disputed that prior to 31 March 2010 OCL was not liable to be registered for VAT since the threshold had not been achieved. Mr Wood pointed out that the charters in 2010 did meet the threshold. Section 24(1) of the Act gives entitlement to input tax credit for input tax on goods “used or to be used for the purpose of any business carried on or to be carried on” by the trader. Section 94(1) of the Act states that “In this Act “business” includes any trade, profession or vocation” but provides no definition of business. However it is well established “the same

meaning must be given to “business” as it appears in The Act as that given to “economic activity” as it appears in article 4 of the Sixth Directive” see paragraph 17 of the judgment of Evans-Loombe J in *Customs and Excise Commissioners v St Paul’s Community Project Limited (2004) EWHC 2490 (Ch)*. The burden of proof is on the Appellant and in order to succeed in this Appeal it would have to be established that the yacht was purchased for business purposes. The test was set out by Stuart-Smith J in *Ian Flockton Developments v Commissioners of Customs and Excise [1987] STC 394*:

“The test is were the goods or services which were supplied to the taxpayer used or to be used for the purpose of any business carried on by him? The test is a subjective one: that is to say the fact-finding tribunal must look into the taxpayer’s mind as it was at the relevant time to discover his object. Where the taxpayer is a company, the relevant mind or minds are those of the person or person who control the company or are entitled to and do act for the company.”

31. Although Mr Wood was adamant that he had made all relevant decisions we did not accept that. As indicated in paragraph 4 above, where there was conflict, we preferred Mr Wylie’s evidence. Mr Wylie stated that he had identified the possibility of using the second Family Affair for charters and that he had drawn that to Mr Wood’s attention. The contact telephone number on the VAT registration was that of Mr Wylie, all charters were arranged and managed by him or his wife, the purchase was negotiated by him, and the repairs organised by him. As indicated in the pleadings, PMS considered him to be a Director of OCL. The Tribunal had no hesitation in finding that at all relevant times the day-to-day management and control of the company lay with Mr Wylie.

32. Mr Wylie was fairly consistent in his evidence, both written and oral. In late 2008, his wife had decided that she wanted a yacht and they both learnt to sail having had no such exposure previously. He had the money to finance the purchases without recourse to borrowing. They both crewed the vessel for the six charters. She has since decided that she has no interest in sailing; her interest at the date of the Hearing was in motor homes. Mr Wylie was clear that their interests had moved on from sailing, that he intended retiring to Spain and that Mr Wood should, at least in large part step into his shoes in terms of his various companies. It is accepted that Mr Wood has no interest in sailing for himself and has never used Family Affair. Mr Wood is very close, professionally and personally to both Mr and Mrs Wylie. What then was the position in late December 2008 and into 2009/2010? Was there a business, for VAT purposes, in chartering the yacht?

33. In *Customs and Excise Commissioners v Lord Fisher [1981] STC 238* Gibson J considered the following criteria relevant in determining whether a business was being carried on:

- (1) Whether the activity was a serious undertaking earnestly pursued;
- (2) Whether it was an occupation or function actively pursued with recognizable or reasonable continuity;

- (3) Whether it had a degree of substance;
- (4) Whether it was conducted in a regular manner and on sound and recognized business principles;
- (5) Whether it was predominantly concerned with making taxable supplies for consideration; and
- (6) Such as consisted of taxable supplies of a kind commonly made by those who seek to profit by them.

34. If the business of charter of the vessel was a serious undertaking earnestly pursued, quite apart from any other factor, there would have to be appropriate insurance and MCA coding. At no stage was either in place. The contract with Catima (which was entered into after HMRC had raised concerns about whether OCL was a business) could not proceed because of the lack of MCA coding and appropriate insurance. Mr Wood stated that the MCA coding would have cost of the order of £10,000 yet the payment from the charter in 2009 was not utilised for that and was left lying in a safe in Mr Wylie's home for six months. Similarly, payments for the 2010 charters were only banked in October 2010 and at least £12,000 had again been held in cash by Mr Wylie for a number of months. The Tribunal was not persuaded by Mr Wood's argument that the lack of the VAT repayment meant that the modifications for the MCA coding could not be put in place as the payment from the charters could have been utilised for that purpose. Had the business been actively pursued then it would have been expected that the MCA coding would have been a priority; clearly it was not. It is accepted that the vessel would be capable of being used for business purposes but not until the work was done for MCA coding. It is accepted that there are defects in the vessel but as averred by the Defenders in the ongoing litigation it was apparently seaworthy for the charters in 2010. In the closing submission for the Appellant it was argued that the MCA coding work had not been done since that would have invalidated the warranty. That was not an argument that had been raised previously but the key issue is that without the coding the vessel could not be used as a business asset and could not be marketed as such.

35. The specification of the vessel and therefore the warranty, the lack of coding and the insurance all point to a personal and not a commercial use of the vessel. That personal use was by Mr Wylie and his wife. They neither sought nor received remuneration for crewing the vessel.

36. Prior to the decision in March 2010 that the Appellant was not entitled to be registered for VAT there had only been one charter and there was no evidence of any structured business plan involving marketing etc. The charters in 2010 which, in terms of quantum of payment, were relatively substantive were all to businesses and friends of Mr Wylie. Effectively they were all for Mr Wylie's direct or indirect benefit.

37. The invoices were not in chronological order and as indicated in paragraph 22 above the payments were from diverse sources and in the case of the payments from the Euro Pools companies they were paid very late. Mr Wylie was very clear that credit control in his companies was a matter for Mr Wood. Accordingly, it appears

that it was Mr Wood who therefore disadvantaged his company OCL by delaying payment from Mr Wylie's other companies in a situation where Mr Wylie understood that all charters should be paid in advance. It is noted that within days of those funds being credited to OCL, OCL paid £70,000 direct to Mr Wylie. That payment was described by both Messrs Wood and Wylie as being a repayment of the loan from Mr Wylie to Mr Wood. Had there been appropriate record keeping that should have been a payment by OCL to Mr Wood. There is no evidence that OCL's activities were conducted in a regular manner and on sound and recognised business principles. Indeed the treatment of the payments for the charters is evidence that the cash management was far from good practice. It is wholly inconsistent that a company which alleged that the absence of the VAT repayment caused serious cash flow problems should leave funds in a private home for months at a time. The lack of appropriate insurance and coding also point to a departure from sound and recognised business principles as does the fact that Mr Wood made it explicit, in his e-mail to HMRC dated 26 February 2010, that he had concealed from Fairline (the manufacturer of the vessel) the fact that the vessel had been used for commercial purposes. Although it is not fatal there is no substantive business plan and there has been almost no marketing of the vessel.

38. The evidence all points to Mr Wylie, having decided to take up sailing and having identified an attractively priced vessel, drawing that to Mr Wood's attention and then funding OCL as a vehicle to hold the investment. Although Mr Wood was exposed to risk in the event that the personal guarantee to Mr Wylie was called in, that was not an arm's length transaction and there was no interest payable. Mr Wylie was clear that he was not concerned about the duration of the loan, it had been and could be extended, that the vessel itself was a substantial asset and that his funds were secured by that alone and most significantly that "it is minor in the context of all the other activities we do with Paul". He was equally clear that Mr Wood not only did a lot of work for him but he was his friend, protégé and potential successor.

39. The Appellant could only succeed in establishing that it is entitled to VAT registration (and the related entitlement to deduct input VAT) if the charters were carried out in the course of an economic activity. The ECJ case *Enkler v Finanzamt Homburg [1996] STC 1316* shows that where an asset is suitable for both business and private purposes all the circumstances in which the asset is used must be considered in order to determine whether or not it is used in the course of economic activity. On the evidence, both oral and written that we have seen, the Tribunal is not satisfied that the six charters could possibly amount to a business and we have to conclude that there was no real intention at any juncture that the yacht was to be used for a business purpose by OCL unless or until Mr Wylie gave up sailing and or moved to Spain.

40. Although the six charters, which were only for a total of less than seven weeks out of a season lasting five months, amounted to the making of supplies of a type commonly made by those who seek to profit from them, and in the summer of 2010 there was a degree of continuity, those factors in the context of all the other issues described above, including the relationship between the parties, are insufficient to amount to a business or economic activity. Accordingly, since we are satisfied that

the charters were not made in the course of a business the decision of the Respondents to refuse the reclaim of VAT and deregister the business is confirmed and the Appeal fails.

5 41. This document contains full findings of fact and reasons for the decision. Any
party dissatisfied with this decision has a right to apply for permission to appeal
against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax
Chamber) Rules 2009. The application must be received by this Tribunal not later
than 56 days after this decision is sent to that party. The parties are referred to
10 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)"
which accompanies and forms part of this decision notice.

15 **MRS ANNE SCOTT, LL.B., N.P.,
TRIBUNAL JUDGE**

RELEASE DATE: 21 DECEMBER 2011

20